





SENATE.....

.....No. 15.

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THE

ATTORNEY GENERAL'S

ANNUAL REPORT....1841.

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PART I.

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## Commonwealth of Massachusetts.

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ATTORNEY GENERAL'S OFFICE, }  
1st February, 1841. }

To the Honorable, the  
President of the Senate:

SIR:—I have the honor to transmit to you my Annual Report, in two parts, prepared in obedience to the provisions of the Statute of 1839, ch. 157.

The first part relates to "*the official duties of the Attorney General.*" The second is compiled from the materials, so far as I have received them, which the Statute requires the District Attornies and other officers to have made to me, on or before the 15th January last, for the purpose of presenting the annual "*Statistics of Crime.*"

I pray you to lay this Report before the Honorable the Legislature.

With the highest respect,

Your obedient servant,

JAMES T. AUSTIN,  
*Attorney General.*

## Commonwealth of Massachusetts.

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THE ATTORNEY GENERAL has the honor, in obedience to the provisions of the Statute of 1839, chapter 157, respectfully to submit the following

### REPORT.

#### PART I.

##### *Of the official duties of the Attorney General.*

By the provisions of the Statute of 1832, ch. 130, the care and direction, within the State, of all civil process to which the State is a party or otherwise interested, is assigned to this officer. This provision, which by that Statute was for the first time made a component part of his regular official duty, has by several subsequent Statutes been greatly extended, so as to embrace all requisitions for professional assistance by the several public departments, and the processes instituted under direction of the Bank Commissioners. During the past year these requisitions have been met in various instances, the result of which may be seen in the accounts of the Treasurer printed by order of the Honorable Senate, and in other cases that have been and yet are pending in the Supreme Judicial Court.

The ancient mode of proceeding by warrant of distress against persons or corporations delinquent at the Treasury, having been superseded, there is now no mode of obtaining payment of the demands of the Commonwealth, where they are not voluntarily made at the time, but by the ordinary pro-

cess of law. The revenues of the State, being principally derived from banks and auctioneers, and the sales upon credit of the public lands, it is obvious may in a great measure be embarrassed by a neglect or failure of the parties indebted, or by the want of prompt means in obtaining judgment.

In case of the inability of the State's debtors fully to discharge all their liabilities, the priority of right on the part of the whole public over individual creditors is not in all cases secured; and experience indicates the possibility, from this cause, of considerable liability to loss. It is found, too, that the bonds of auctioneers are not always taken in sums sufficiently large in amount, or with sufficient regard to the responsibility of the sureties, so that in case of the failure of the principal, the Commonwealth is liable to a loss of its tax. In no case, as yet, has there been any failure by any of those larger establishments from whom the bulk of the auction tax is received; but in the vicissitudes of commercial enterprise, such an event may occur, and can be better guarded against beforehand than remedied afterwards.

Questions have arisen whether property sold by auction, under the operation of the insolvent law, is exempted from payment of the tax, the provision of the Statute in this respect admitting of different constructions.

I have deemed it proper, respectfully to submit to the Legislature the above considerations derived from the experience of the past and former years, as a part of my official relation to the Commonwealth on which they might rightfully expect information.

The subject of an interference, on the relation of the parties interested in suits, which are sought to be instituted for the due enforcement or forfeiture of funds for eleemosynary purposes, was noticed in my last annual report, and continuing to present new questions of interest, I beg leave respectfully to refer to the statement therein presented.

In the criminal department there have been five trials for capital offences during the year. Two of the parties were



convicted of a mitigated offence,—one was acquitted; in the other, the jury being unable to agree after two venires, the defendant was discharged on her own recognizance. Two new cases now remain on the docket for trial.

In cases of this character, the prisoner is entitled to the peremptory challenge of twenty jurors, which, with an unlimited number for cause, gives the accused in fact the selection of the jury. The Commonwealth is not entitled to any peremptory challenge. It is believed that it would produce a greater probability of agreement, if the Commonwealth was entitled to such right in a limited degree, not exceeding three or at most five.

Questions of law, reserved in criminal cases at the Common Pleas, have been presented to the Supreme Court in their usual number and variety, and have been argued by the Attorney General. These must of course vary every year, both in their relative intricacy and importance. By the Statute of 1839, under which this report is prepared, it is not understood that a detail of these various cases is now to be enumerated.

The demand upon this State for fugitives from justice, and the requisition upon other States for fugitives from this, is one of the subjects to which the Attorney General is by the Revised Statutes particularly to attend. This branch of duty has sometimes given rise to novel and interesting discussions; but though many cases have occurred, the year has passed without any thing peculiarly important. The question of most interest has been, in what cases the applicant for an Executive requisition should proceed at his own expense or that of the State; and this question, in the absence of any legislative direction, is, after the facts and circumstances have been ascertained by the Attorney General, decided by the Supreme Executive. It is obvious, however, that the application for the process needs to be carefully watched, as from very obvious circumstances it will be more and more in request, and add to the expenses of the State.

Informations against State Prison convicts for additional sen-



tences upon a singularly complicated system of laws, under which decisions materially at variance with each other have at times been made, are now prosecuted in the Municipal Court, from whose judgment a writ of Error or Bill of Exceptions lies to the Supreme Court. It is respectfully submitted, that this subject is not appropriately brought within the animadversion of a local court; and to save expense as well as to provide for final jurisdiction in the first instance, they should be transferred to the exclusive cognizance of the Supreme Court, and the local officer now pressed with other business be relieved from attending to these cases.

The general condition of the criminal department will be found in the abstracts and tables compiled from the reports of the District Attornies, Judges of Police Courts, and Clerks of the Judicial Courts, which form the second part of this report.

At the last session of the Legislature, for the first time under the law of 1839, I had the honor to present a very minute compilation of all the materials furnished to me in twenty separate tables, covering, in its printed form, one hundred and forty-three pages of the document No. 20 of the Honorable Senate, and condensed from several hundred thousand figures.

The time necessarily occupied in preparing that analysis, and the delay incident to the printing of so many columns of figures in tabular form, prevented the distribution of the document until the close of the session, and of course any action by the Legislature on the results, which to that extent were for the first time presented to its consideration.

I have ventured to believe that a less copious detail would be advantageous on the present occasion, not only to prevent the delay in the possession of the document, which to some degree would defeat the object of compiling it, but because the comprehensive statistics in that report may well serve as a reference for the more general abstracts of the present year; and in connection with these more condensed statements, sufficiently explain the condition of crime, its par-

ticular directions and tendency,—the character of the punishments inflicted, and the sanitary operation of the laws.

Being directed to accompany these statements “with such observations as in my opinion the criminal jurisprudence and the proper and economical administration of the criminal law shall warrant and require,” I do, in obedience to that direction most respectfully submit:—

I. That although there have been during the year some cases of most atrocious crime, the general character of the criminal calendar is that of the more common and mitigated offences.

II. It is obvious that the duty of the criminal department has been more onerous from year to year, and that there has been a general progression, in this respect, for several successive years. The increase of the county balances is both the proof and the consequence of this additional duty upon the criminal department.

This increase is to be traced to several causes:

1. To the increase of population and the inherent vice of society, which under every administration of criminal law and under every known code of criminal jurisprudence, bear a certain relation to each other.

2. To the greater facilities of intercourse between populous cities of which the felon takes advantage as well as the true man. This intercourse not only favors crime by the chances of escape, but by requiring pursuit to be made to distant places, and often requiring the travel and attendance of witnesses from other States, adds much to the charges of prosecution.

3. The more elaborate mode of trial, gradually extending from year to year, has added much to the expense of criminal prosecutions by augmenting the bills of costs.

4. The Legislature has from time to time added to the list of actions punishable as crime. The 18th section of the 130th chapter of the Revised Statutes, is the foundation of at least one thousand criminal complaints in the course of a year.

5. The fees of witnesses before magistrates have been raised from 33 to 50 cents per day.

6. Temporary circumstances sometimes increase the costs, and of course the county balances, payable by the Commonwealth. Thus, under the statute of 1838, ch. 157, a vast number of prosecutions were instituted, as shown in previous reports. Most of these were litigated with great zeal, and with entire recklessness of expense, on the part of the defendants. The Commonwealth was of necessity compelled to similar exertions. By a resolve of 1840, ch. 52, the pending prosecutions were discharged. The costs of 417 were thus assumed by the Commonwealth, as is seen on page 137 of my last annual report, according to returns then received. By subsequent returns, 438 cases, creating costs to the amount of \$5,959 59, as appears by the — table in the present report, became chargeable to the Commonwealth.

Other cases, pending in the several police courts, and before magistrates, swell this sum to an amount not less than seven thousand dollars, which has or in due time will appear in the county treasurers' balances.

It has been sometimes supposed, that the charge upon the Commonwealth was increased to too great a degree by the number and expense of the prosecuting officers; and that these were more in number, and at larger expense, than in other States of the Union.

Of the first branch of the complaint, it is not my province to do more than state the facts. The whole civil and criminal department, properly belonging to such officers, is managed by six individuals, at the cost of seven thousand dollars per annum, unequally divided between them.

In the State of New York, there are, in addition to an Attorney General, as appears by the printed report of the comptroller for 1839, now before me, and the last that I have received, fifty-six prosecuting officers, and the compensation of forty-five, from whom only returns are reported, amounted, for the year 1838, to \$25,798 40. Among the number omitted is the

District Attorney of the city of New York ; and by calculation, founded on the relative proportion of fees, it may be safely concluded that the whole annual amount to the State, is not less than \$38,000.

Although in that large State the public service demands more time and labor than in ours, yet the difference bears a very unequal proportion, as may be seen in the official returns for the preceding years :

*Number of Criminal Convictions.*

	1835.	1836.	1837.	Total.
New York,	1076	963	1086	4216
Massachusetts,	693	679	852	2961

It is believed as extensive and costly a system is adopted in the State of Pennsylvania. In each county in that State, is a prosecuting officer, and in some counties an additional counsel, or additional fees to the same officer for civil business. No general statement has been seen by me ;—but for a different purpose, the special reports in 26 counties, for one year, to the first of January, 1839, were sent to me, from which it appears that to 34 officers there was paid \$5,342 19, including \$2,365 78 to the Attorney General, for his services in the city of Philadelphia.

In a report presented to the Legislature of New York, a comparison was instituted in respect to the prevalence of crime between that State and some of the principal countries of Europe. But it was well observed, that by reason of the different classification of offences, and the difference which exists in the administration of the criminal laws, such comparison was exceedingly difficult. To some extent, the difficulty exists in any comparison between this Commonwealth and any other State, principally by reason of the offences, which are the subjects of summary convictions, but not to so great a degree in regard to the labor of the judicial department in criminal affairs. Thus the convictions in 1836, in England and Wales,



amounted to 14,771, in a population estimated at 14,000,000, or one to every 948 inhabitants. In New York, in 1838, they were 1,086, in a population of 2,200,000, or one to 2,025. In Massachusetts, in 1838, they were 852, in a population estimated at 700,000, or one to 822. See the tables compiled from the reports made to the Attorney General, in his report made to the Legislature 3d January, 1839, and the report of the Secretary of the State of New York, dated 1st February of that year. The cause of this apparent excess is also obvious, by a comparison of the tables. The prosecutions by indictment, in this State, include many minor offences, which are elsewhere proceeded against in a more summary way.

But no change can be recommended in our practice. It would be injurious to public manners, that the smaller offences should be unpunished, and against private right and public liberty, to proceed against the offenders in a more summary mode.

The Legislature will not consider these remarks inappropriate, when it is understood that the subject matter of them has already been the subject of commentary in other countries, where the forms of our judicial proceedings are not correctly appreciated.

Having thus submitted the results of my observation and experience on this subject of the criminal costs, the Statute requires from me an expression of opinion in regard to the future economical administration of this department. In deference to this authority, and with the most respectful consideration for the high constitutional prerogative of the Legislature, I venture to make the following suggestions, to be modified by such amendments as in their wisdom they may deem proper.

1. That the administration of the criminal law should be made uniform, and be conducted by the same courts through all the counties of the Commonwealth, by which an annual diminution of ten thousand dollars may be made in the general expenses.

2. That all prosecutions for the illegal sale of ardent spirits,

or for the undue indulgence in the use of them, should be prosecuted in the name of the Commonwealth, only on the complaint and at the option of the selectmen of the town in which the accused resided; and that the costs, when not paid by the accused party, should be charged to the town. By this simple amendment another sum, not less than ten thousand dollars per annum, would be struck off the county balances, and more than half of it—if I am not much mistaken—entirely saved, without any diminution in the efficacy of the existing prohibitions.

It is believed, that a great proportion of the past prosecutions on these laws are the result of personal passion and ill temper. In some, at least, men who are angry with their neighbor for one cause, prosecute him for another.

The Legislature has already provided, that the costs of the prosecution on the by-laws of a town shall be charged to the town, and not the Commonwealth.

The offences above alluded to, though involving high moral consequences, and of mighty moment to the Commonwealth and the nation, are nevertheless of the class of municipal regulations, because, to a certain extent, it is the abuse only of a municipal privilege, of which the law takes cognizance. The selectmen, who may approve an application for a license, are the suitable supervisors of those, who ought, or ought not, to obtain it.

But besides, the experience of our legislation indicates, that, for the great objects which these laws have in view, it is the paternal government, and the public opinion of the community, and not the stern severity of criminal law, which is the most effectual agent. Now the selectmen are truly the *custodes morum*, of the little republics over which they preside; and could do more by influence and mildness in this regard than the sheriff, the constable, or the House of Correction. Certain it is, that the Commonwealth is now at great expense to very little benefit. The crime seems to grow with the prosecutions. A thousand bad passions are generated, and very little reform-

ation produced. Some change is indispensable, and nothing can be more injurious than the present system.

3. The fees of witnesses before justices, are an inducement to prosecutions, and, in many cases, the half dollar, nominally for a day's attendance, is earned in half an hour. The fiction of the law, that a day cannot be divided, should be treated as a fiction, especially in populous places.

4. The expense of bringing persons to the magistrate's place of business, and thence to jail, is an increasing item of expense, and belongs especially to prosecutions for inferior offences. Great innovations have been made on ancient practices in this respect, and are gathering force by precedent and custom.

Differences might be made in these expenses—and, by judicious officers, often are—between persons accused of felony, or other high crime, and the supposed perpetrators of some less aggravated offence. The proceedings, in this respect, are not under the eye of the prosecuting officers of the government, and of course, I have no official information upon the subject, but, as it is said by authority, that "report is a proper cause for inquiry," it may authorize me respectfully to make the above remark.

It is an observation that experienced men have made in most parts of our country, that there are apparently tides in the character and flow of crime. Sometimes the State is comparatively tranquil, and again subject to violent irruptions. At one period, one species of crime prevails more extensively, and at another period, another.

Notwithstanding the number of prosecutions, and the flagrant offences that have received judicial animadversion, the past year may, on the whole, be deemed favorable to the general peace of the Commonwealth.

Most respectfully submitted, by

JAMES T. AUSTIN, *Attorney General.*











